MALAYSIA AIRPORTS (SEPANG) SDN BHD

v.

MALAYAN BANKING BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-913-2005]
31 JANUARY 2007

CIVIL PROCEDURE: *Summary judgment - Appeal against - Claim arose from a performance guarantee - Whether plaintiff served on defendant a notice of demand in compliance with performance guarantee - Whether plaintiff had right to make claim - Whether defendant had waived the requirement that a fresh letter of demand had to be made after a notice of assignment was received - Whether demand should be treated as valid - Whether senior assistant registrar made the right decision to grant summary judgment*

CIVIL PROCEDURE: *Service - Notice of demand - Whether plaintiff served on defendant a notice of demand in compliance with performance guarantee - Whether plaintiff had right to make claim - Whether defendant had waived the requirement that a fresh letter of demand had to be made after a notice of assignment was received - Whether demand should be treated as valid*

This was an appeal by the defendant against the decision of the senior assistant registrar in allowing the plaintiff to enter summary judgment against the defendant. The plaintiff's claim arose from a performance guarantee which the defendant gave in respect of the performance of a tenancy contract with a company, Agate Sdn Bhd. The performance guarantee was originally issued to a company called Malaysia Airports Berhad which subsequently assigned the said guarantee to the present plaintiff. The defendant contended, *inter alia,* that when the plaintiff made the demand on the defendant there was a novation agreement dated 12 January 1999 between the plaintiff, Agate Sdn Bhd/ Malaysia Airports Berhad which the defendant was not a party to. The defendant further argued that it was not aware of the transfer of rights to the plaintiff as no notice was given and that the only notice of demand on the guarantee was received by the defendant on 16 June 2000. The defendant submitted that this was therefore the effective date from when the plaintiff could make a demand on the performance guarantee. The plaintiff only made a demand on the

A performance guarantee on 28 April 2000 before notice of assignment was given to the defendant. The plaintiff, however, contended that after the notice of demand was served the defendant had written a letter dated 8 May 2000 to the plaintiff informing the latter they would honour the claim only if the B plaintiff could produce a certified true copy of the said novation agreement and a written confirmation that the plaintiff had the right to make a claim on the bank guarantee. It was submitted by the plaintiff that both conditions had been complied with. The question that arose was whether the plaintiff had served on the C defendant a notice of demand on the guarantee in compliance with the performance guarantee issued by the defendant.

Held (dismissing defendant's appeal with costs):

D **(1)** There was an effective assignment of the performance guarantee from the original beneficiary Malaysia Airports Berhad to the plaintiff. Prior to the defendant receiving the notice of assignment on 16 June 2000, the plaintiff had made a demand on the guarantee as an assignee. Further, the copy of the novation agreement with a written confirmation by E Malaysia Airports Berhad that the plaintiff had the right to make the claim were provided by the original beneficiary Malaysia Airports Berhad to the defendant by a letter dated 11 May 2000, which also confirmed that the plaintiff had the right to make the claim. (paras 11 & 12)

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(2) The defendant, by writing the letter agreeing to honour the plaintiff's demand on the two conditions being met and its subsequent conduct of remaining silent after having received the documents requested for from the original beneficiary, G should now be estopped from denying that it had waived the requirement that a fresh letter of demand had to be made after a notice of assignment was received by it and that it was prepared to treat the demand as valid. The senior assistant registrar had made the right decision to grant summary H judgment to the plaintiff. (paras 12, 13, 15 & 16)

Case(s) referred to:

Boustead Trading (1985) Sdk Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

I *FC Seek Trading As Oversea Structural Company v. Wong And Lee [1940] 9 MLJ 182* ***(refd)***

UMW Industries Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***

For the plaintiff - M Devan; M/s Devan & Assoc
For the defendant - SY Ng (Md Ashraf with her); M/s Raja Darryl & Loh

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

[1] This is an appeal by the defendant against the decision of the senior assistant registrar in allowing the plaintiff to enter summary judgment against the defendant.

This Is My Oral Judgment: ***(ex-tempore)***

[2] The plaintiff's claim arose from a performance guarantee which the defendant gave in respect of the performance of a tenancy contract with a company called Agate Sdn. Bhd.

[3] The performance guarantee is an 'on demand guarantee' which read as follows:

> Maybank
>
> Shah Alam Trade Finance Centre Level 2, No. 10 Persiaran Perbandaran, Section 14 40000 Shah Alam, Selangor, Malaysia.
>
> Date: Dec 03, 1997
>
> D8-22-913-05L.31 3 Alasan
>
> To:
>
> Malaysia Airports Berhad
> Wisma Bintang, Lot 13A
> Jalan 225, Peti Surat 8076
> 46100 Petaling Jaya.
>
> Sir,
>
> **Performance Guarantee Our Ref: 990608GP274575**
>
> As requested by the concessionaire, Agate Sdn Bhd
> Lot 7 Kawasan Miel
> Jalan Bursa 23/4
> 40000 S Alam
> Malaysia.

We hereby guarantee that the sum of MYR880,000-00 (Malaysian ringgit eight hundred eighty thousand only) being the amount of security deposit required for the due performance of the convenants of their agreement to operate the business of perfume and cosmetic at the retail store at the main terminal building arrival International Level, Lot 08, Kuala Lumpur International Airport (KLIA), Sepang, Malaysia, shall become payable by us on demand by you.

The guarantee is valid from April 01,1998 until September 30, 2001 and may be renewed at our absolute discretion by notice in writing from us to you before the expiry date provided always the maximum aggregate amount that you shall be entitled to under this guarantee or any subsequent renewed guarantees issued from time to time pursuant to this clause shall not exceed the sum of MYR880,000-00 (Malaysian ringgit eight hundred eighty thousand only).

Notwithstanding any other provisions herein before contained, if on the expiry of thirty (30) days after the date of expiry of this guarantee or any subsequent renewed guarantee given by us, we have not received any demand from you, this guarantee or any subsequent renewed guarantee as the case may be shall lapse and cease to have any effect whatsoever and we shall be deemed to be discharged and released from all and any liability under this guarantee without prejudice however to any claim which you make prior to the expiration of the said thirty day period.

For Maybank

Sgd.	Sgd.
Khairil Amran	Chen Yoke Heong
021458	9106

[4] The plaintiff made the demand on the guarantee by a letter dated 28 April 2000 as follows:

Our reference: MAB-MA(S) BD (600-02/01/01)
Your reference: 99060BGP274575
Date: 28 April 2000

M/s Malayan Banking Berhad
Shah Alam Trade Finance Centre
Level 2 Persiaran Perbandaran,
Section 14
40000 Shah Alam
Selangor Darul Ehsan.

By fax and hand
Fax no.: 03-55102320

Dear Sir,

Performance Guarantee No.: 99060BGP274575

The above subject matter refers.

In line with the provision of Clause 4 in the Concession Agreement No. 021/98 (KLIA) entered between Agate Sdn. Bhd. and Malaysia Airports Berhad dated 1 December 1997, which was novated to Malaysia Airports (Sepang) Sdn. Bhd. (Malaysia Airports (Sepang)), it is entitled to claim the payment from the said Performance Guarantee after Agate Sdn. Bhd. has defaulted its payment under Clause 3 of the same agreement.

Under Paragraph 2 of the above Performance Guarantee, Malayan Banking Berhad as the Guarantor shall immediately pay to Malaysia Airports (Sepang) the amount under demand. In that regard, Malaysia Airports (Sepang) is hereby submitting its first written demand of RM880,000.00 of payment from your Performance Guarantee No.: 99060BGP274575 as partial payment of Agate Sdn. Bhd.'s outstanding Balance to Malaysia Airports (Sepang).

Attached herewith please find the original Copy of Performance Guarantee No.: 99060BGP274575 for your necessary action.

Thank you.

Yours faithfully,

for Malaysia Airports (Sepang) Sdn. Bhd.

Sgd
(Haji Hamid bin Awang)
Property Manager

c.c. Agate Sdn. Bhd.
Lot 7 Kawasan MIEL
Jalan Bursa 23/4
40000 Shah Alam
Selangor Darul Ehsan.

[5] The performance guarantee was originally issued to a company called Malaysia Airports Berhad which subsequently assigned the said guarantee to the present plaintiff.

[6] The only issue in this appeal is whether the plaintiff had made a proper demand under the terms of the performance guarantee.

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[7] The Defendant Contends

1. At the time of demand the plaintiff was not a beneficiary to the performance guarantee and therefore the defendant was not obliged to make payment to the plaintiff.

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2. The notice of assignment of the performance guarantee was only given to the defendant in a letter dated 16 May 2000 which the defendant received only on 16 June 2000.

3. The performance guarantee expired on 30 September 2001. The plaintiff did not make any demand on the performance guarantee between 16 June 2000 and 30 September 2001. The demand that was made on 28 April 2000 was bad in law as it did not comply with the terms of the guarantee which required Malaysia Airports Berhad to make the demand.

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4. When the plaintiff made the demand on the defendant there was a Novation Agreement dated 12 January 1999 between the plaintiff/Agate Sdn. Bhd./Malaysia Airports Berhad whereby the plaintiff was given the right to the performance guarantee and also assumed the obligations and rights under the tenancy agreement between Malaysia Airports Berhad and Agate Sdn. Bhd.

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5. The defendant was not a party to the Novation Agreement and was not aware of the transfer of rights to the plaintiff as no notice was given. The only notice of demand on the guarantee was received by the defendant on 16 June 2000. This was therefore the effective date from when the plaintiff can make a demand on the performance guarantee.

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6. The plaintiff only made a demand on the performance guarantee on 28 April 2000 before notice of assignment was given to the defendant.

[8] The Plaintiff Contends Otherwise

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1. After the notice of demand was served the defendant had written a letter dated 8 May 2000 to the plaintiff wherein they had informed the plaintiff that they were prepared to honour the claim only if the plaintiff could produce a certified true copy of the Novation Agreement made between Malaysia Airports Berhad and the plaintiff and a written confirmation by

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Malaysia Airports Berhad that the plaintiff had the right to make a claim on the bank guarantee. The letter read as follows:

Date : 8-5-2000
Your Ref : MAB-MA(S)BD(600-02/01/01)
Our Ref : 99060/RL/CYH/BG274575

The Manager
Malaysia Airports (Sepang) Sdn Bhd
3rd & 4th Floor, Airport
Management Centre
KL International Airport
64000 KLIA, Selangor Darul Ehsan.

Dear Sir

Re: Claim on BG no: 99060BGP274575 for RM880,000.00

Name of customer : Agate Sdn. Bhd.

The above claim on Bank Guarantee refers.

As per our Legal Department's advice, we can only honour your claim provided you could produce a certified true copy of the Novation Agreement made between Malaysia Airports Berhad (MAB) and your goodself (since the beneficiary of above BG is in the name of MAB) and a written confirmation by MAB that you have the right to make claim on the said BG.

Thank you.

Yours faithfully
For Maybank
Shah Alam Trade Finance Centre

Sgd.
Roslin bt Hj Ludin
Centre Manager.

Submits: By this letter the defendant had acknowledged the demand made and imposed two conditions for the payment of the claim namely: (i) that the plaintiff forward a certified true copy of the Novation Agreement and (ii) that the plaintiff forward a written confirmation by Malaysia Airports Berhad that the plaintiff had the right to make the claim on the bank guarantee.

Subsequently by a letter dated 11 May 2000 Malaysia Airports Berhad notified the defendant that the plaintiff was entitled to enforce the bank guarantee given under the Concession Agreement and a copy of the Novation Agreement was attached thereto.

Submits: Both conditions had been complied with by the plaintiff.

Submits: *UMW Industries Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379.

Submits: In any case the letter dated 8 May 2000 from the defendant to the plaintiff constitutes an acknowledgement and waiver of any requirement that may have to be fulfiled with respect to the demand. By means of this letter the defendant led the plaintiff to believe that they would make payment if the two conditions were met and at no time after this did the defendant ever sent a letter to the plaintiff to inform them that they are disputing the notice of demand. Had they done so the plaintiff would be in a position to issue a new notice thereby validating the notice of demand.

[9] Reply By Defendant

1. There was no waiver which must be clear and unequivocal which must lead the plaintiff to act on the waiver.

2. On a letter dated 8 December 2000 the defendant never said that the terms and performance guarantee need not be complied with. All that was said was the defendant needed a copy of the Novation Agreement and written confirmation by Malaysia Airports of plaintiff's right to make a claim.

3. In essence the plaintiff has never made any demand except in the letter dated 28 April 2000.

4. By the letter dated 16 May 2000 there was a proper notice of assignment given by the Malaysia Airports indicating that this would give the plaintiff capacity to act on the bank guarantee but the plaintiff never acted on it or made any demand on it.

5. See *F.C. Seek Trading As Oversea Structural Company v. Wong And Lee* [1940] 9 MLJ 182.

Findings And Decision

[10] The success of the plaintiff's action turns on the question of whether the plaintiff had served on the defendant a notice of demand on the guarantee in compliance with the performance guarantee issued by the defendant.

[11] Having heard the submission of the parties I find as follows:

1. There was an effective assignment of the performance guarantee from the original beneficiary Malaysia Airports Berhad to the plaintiff. This is evidenced by the letter dated 16 May 2000 (exh. SM2 encl. 8).

2. The performance guarantee did require a valid notice of demand to be made and I accept the submission of the defendant that this ought to have been made by the plaintiff after the defendant received the notice of assignment that is to say 16 June 2000.

3. A party to a contract however is free to waive any pre-condition that must be satisfied by the other.

4. It is to be noted that prior to the defendant receiving the notice of assignment on 16 June 2000, the plaintiff had in fact made a demand on the guarantee as an assignee. The defendant had by its reply agreed to honour the plaintiff's demand if the plaintiff could provide them:

   (i) with a copy of the Novation Agreement;

   (ii) with a written confirmation by Malaysia Airports Berhad that the plaintiff had the right to make the claim.

5. The above two documents were later provided by the original beneficiary Malaysia Airports Berhad to the defendant by a letter dated 11 May 2000. The letter also served to confirm that the plaintiff had the right to make the claim.

[12] Having considered the sequence of events that transpired it is clear to me that the defendant by:

(i) writing the letter agreeing to honour the plaintiff's demand on the two conditions being met;

A (ii) its subsequent conduct of remaining silent after having received the documents requested for from the original beneficiary;

should now be estopped from denying that it had waived the B requirement that a fresh letter of demand had to be made after a notice of assignment was received by it and that it was prepared to treat the demand as valid.

[13] The scope of the equitable principle of estoppel is now well C defined in our jurisdiction by the Federal Court case of *Boustead Trading (1985) Sdk Bhd. v. Arab-malaysian Merchant Bank Berhad* [1995] 4 CLJ 283, per Sri Ram JCA at 294:

> The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done D according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
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> Edgar Joseph Jr. J (as he then was) in an illuminating judgment E in *Templeton v. Low Yat Holdings Sdn. Bhd.* [1989] 2 MLJ 202, 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act, 1952.
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> The doctrine may be applied to enlarge or to reduce the rights or F obligations of a party under a contract: *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA. 203; *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] QB 84. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner For Religious Affairs, Trengganu v. Tengku Mariam binti Tengku Sri Wa Raja* [1970] 1 G MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v. Liverpool Victoria Trustees* [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons* H *Stores (Interstate) Ltd. v. Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v. Lintern* [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* I case *(supra)*) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or

meaning: *The American Surety Co. of New York v. The Calgary Milling Co. Ltd.* [1919] 48 DLR 295; *De Tchihatchef v. The Salerni Coupling Ltd.* [1932] 1 Ch. 330; *Taylor Fashions (supra)*.

[14] The action and conduct of the defendant referred to in (i) and (ii) above had been acted upon by the plaintiff to its detriment, to believe that the defendant would accept the demand on the guarantee made by the plaintiff on 28 April 2000 as effective and binding on the defendant – for had the defendant informed the plaintiff any earlier that the two documents were unacceptable, the plaintiff could have made a perfectly valid fresh demand on the guarantee between the period the notice of assignment was received by the defendant and the expiry of the letter of guarantee.

[15] The senior assistant registrar had made the right decision to grant summary judgment to the plaintiff

[16] The defendant's appeal is dismissed with costs.